

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Robert G. Taub

Modern Rules of Procedure
for the Issuance of
Advisory Opinions in Nature of
Service Proceedings

Docket No. RM2012-4

ADVANCE NOTICE OF PROPOSED RULEMAKING
ON MODERN RULES OF PROCEDURE FOR NATURE OF SERVICE CASES UNDER
39 U.S.C. 3661

(Issued April 10, 2012)

The Commission is soliciting comments on its current procedures under 39 U.S.C. 3661 for reviewing proposals by the Postal Service to make changes in the nature of postal services. After reviewing the comments submitted in this proceeding, the Commission may institute rulemaking proceedings to consider the adoption of new, updated procedures for processing nature of service cases. The goal of any such changes would be to increase the efficiency and timely resolution of nature of service cases while protecting the rights of all participants, including affected mail users.

In this proceeding, the Commission welcomes comments on (1) whether changes to the current procedures and regulations are warranted; (2) if so, what those

changes would be; and (3) such other relevant subjects as commenters may wish to address.

I. BACKGROUND

Nature of service proceedings conducted pursuant to 39 U.S.C. 3661 have traditionally been referred to as “N-cases”. In N-cases, the Commission issues advisory opinions on proposals by the Postal Service for “a change in the nature of postal services which will generally affect service on a nationwide, or substantially nationwide basis....” 39 U.S.C. 3661(b).

The Commission’s authority to conduct N-cases was originally established by the Postal Reorganization Act of 1970, Pub L. 91-375, August 12, 1970 (PRA). Five N-cases were initiated between the enactment of the PRA in 1970 and the passage 36 years later of the Postal Accountability and Enhancement Act (PAEA), Pub L. 109-435, 120 Stat. 3219 (2006).¹ In the 5 years since passage of the PAEA, the Commission has docketed four N-cases.²

The varying degrees of complexity presented by N-cases affects the time required to issue advisory opinions. Ordinarily, cases that present the most far-reaching implications to mailers require more extensive procedures and a greater time between the initial filing and the issuance of an advisory opinion by the Commission. To date, the Commission has issued advisory opinions in three of the four N-cases instituted

¹ Docket No. N75-1, Retail Analysis for Facilities Development Program; Docket No. N75-2, Changes in Operating Procedures Affecting First-Class Mail and Airmail; Docket No. N86-1, Change in Service, 1986, Collect on Delivery Service; Docket No. N89-1, Change in Service, 1989, First-Class Delivery Standards Realignment; Docket No. N2006-1, Evolutionary Network Development Service Changes, 2006.

² Docket No. N2009-1, Station and Branch Optimization and Consolidation Initiative, 2009; Docket No. N2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010; Docket No. N2011-1, Retail Access Optimization Initiative, 2011; Docket No. N2012-1, Mail Processing Network Rationalization Service Changes, 2012.

since enactment of the PAEA.³ The length of those proceedings ranged from a low of 5 months in Docket No. N2011-1 to a high of 12 months in Docket No. N2010-1.⁴ The fourth post-PAEA proceeding was filed on December 5, 2011, and remains pending.

Recently, the Postal Service has found itself in an extremely challenging financial situation, and is seeking to act quickly to remedy its financial difficulties. The Postal Service has expressed a need for a more expeditious hearing process for N-cases in light of its present financial situation. Thus, the Commission is soliciting comments on the advisability of adjusting N-case procedures in ways that allow more timely and relevant advisory opinions.

II. LEGAL REQUIREMENTS

A. 39 U.S.C. 3661

If the Postal Service determines that a change in the nature of its services that will affect mail users on a nationwide or substantially nationwide basis may be called for, it must, prior to implementation, submit a proposal to the Commission requesting an advisory opinion on the proposed changes. 39 U.S.C. 3661(b). After the request is submitted, the Postal Service, mail users, and an officer of the Commission required to represent the interests of the general public must be afforded an opportunity for a hearing on the record in accordance with the provisions of 5 U.S.C. 556 and 5 U.S.C. 557. 39 U.S.C. 3661(c). Those two statutory sections—section 556 and section 557—are part of the federal Administrative Procedure Act. Section 556 sets forth the procedures by which administrative agencies must conduct evidentiary

³ Docket No. N2009-1, Station and Branch Optimization and Consolidation Initiative, 2009; Docket No. N2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes, 2010; Docket No. N2011-1, Retail Access Optimization Initiative, 2011.

⁴ In Docket No. N2009-1, the Postal Service filed its request on July 2, 2009, and the Commission issued its advisory opinion 8 months later on March 10, 2010. In Docket No. N2010-1, the Postal Service filed its request on March 30, 2010, and the Commission issued its advisory opinion nearly 12 months later on March 24, 2011. In Docket No. N2011-1, the Postal Service filed its request on July 27, 2011, and the Commission issued its advisory opinion almost 5 months later on December 23, 2011.

hearings. Section 557 establishes requirements for decisions issued in those administrative hearings. At the conclusion of an N-Case proceeding, the Commission must issue a decision in the form of a written opinion and must include a certification by each Commissioner stating that, in the Commissioner's judgment, the opinion conforms to the appropriate statutory requirements. 39 U.S.C. 3661(c).

B. Current Procedural Regulations

The Commission's procedural rules implementing the requirements of section 3661 can be found in 39 CFR 3001.71 through 3001.75. These procedural rules were first written in 1973 and last updated nearly 20 years ago. Procedural rules of general applicability in subpart A of 39 CFR part 3001 also apply.

III. COMMISSION'S SECTION 701 REPORT

On September 22, 2011, the Commission presented an analysis to Congress and the President discussing how the PAEA is operating and recommending measures to improve the effectiveness and efficiency of postal laws.⁵ In the 701 Report, the Commission recommends that Congress consider adding statutory language allowing the Postal Service to request expedited consideration for time-sensitive N-cases and requiring the Postal Service to provide a written response to Commission advisory opinions as well as submitting its response to Congress prior to implementing such changes in service. *Id.* at 71-85.

Attached to the 701 Report was a Postal Service response to the Commission's recommendations, including legislative changes to N-case procedures.⁶ In its response, the Postal Service stated its preference for a pending legislative proposal which, if adopted, would require the Commission to issue advisory opinions on Postal

⁵ Section 701 Report Analysis of the Postal Accountability and Enhancement Act of 2006, September 22, 2011 (701 Report). The report draws its name from section 701 of the PAEA.

⁶ United States Postal Service Response to Commission's Draft Section 701 Report, September 16, 2011 (Postal Service Response to 701 Report).

Service requests within 90 days of filing and would remove the formal hearing requirement from N-case procedural rules.⁷ Postal Service Response to 701 Report at 24. The Postal Service reiterated the need for expedition in handling such cases, while acknowledging that the level of Commission analysis should be consistent with its work in other areas. *Id.*

IV. COMMISSION'S AUTHORITY TO MODIFY PROCEDURES

The Commission has historically conducted N-case hearings as formal, trial-type proceedings. The Commission recently elaborated on this historic approach in an order denying a Postal Service request for reconsideration of the procedural schedule in Docket No. N2012-1:⁸

Before the Commission is permitted to issue an advisory opinion, it is required to provide an opportunity for hearing on the record.... Participants [in this proceeding have] justified requests for hearings on the record. The Commission has procedures in place, both by precedent and rule, to implement these [statutory] requirements, which provide due process to all participants. The procedures are flexible enough to accommodate various complexities of cases, and levels of controversy, but also include procedural steps that once triggered require somewhat rigid increments of time....A reasonable amount of

⁷ The proposed legislation referred to by the Postal Service is contained in S.1010, 112th Cong. § 206. The bill discussed by the Postal Service is one of several currently pending before Congress.

⁸ Docket No. N2012-1, Order Denying Motion for Reconsideration of Ruling Establishing Procedural Schedule, January 31, 2012 (Order No. 1183).

time, consistent with the complexity of the case, must be provided for each step to ensure due process.

Order No. 1183 at 2-3.

The proceedings in Docket No. N2012-1, currently under consideration by the Commission, highlight the challenges that the Commission can face in N-cases. In this case, the Commission has been presented with a multifaceted proposal by the Postal Service with far-reaching implications for mail users. Parties have urged the Commission to permit extensive discovery and sufficient time to allow preparation of technical rebuttal evidence. The Postal Service has emphasized its need for expedition. The Commission has had to balance the competing concerns for due process against the need for expedition.

In light of the increasing frequency of N-cases and their varying degrees of complexity, it is appropriate for the Commission to re-examine its historic practice of conducting N-cases as trial-type proceedings, according participants extensive discovery and oral cross-examination opportunities in all cases. The authority of regulatory agencies like the Commission to revise their regulations to place limits on the use of formal litigation procedures in certain types of cases has been judicially recognized. In *Citizens Awareness Network v. U.S.*, 391 F.3d 338 (1st Cir. 2004), the court held that it was a valid exercise of agency discretion for the Nuclear Regulatory Commission to expedite nuclear reactor licensing proceedings by changing its long-standing procedural regulations to eliminate discovery and restrict cross-examination:

The APA [Administrative Procedure Act] lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules (citation omitted)...short of constitutional constraints, a court may not impose procedural requirements...beyond those mandated by statute....(Citation omitted).

Citizens Awareness at 349.

While procedures differ from agency to agency and while changes in those procedures require careful consideration in the specific statutory and regulatory contexts presented, the *Citizens Awareness* decision supports the general proposition that agencies have flexibility to tailor their procedures to make hearing processes more efficient. As the court in that case recognized: “An agency’s rules, once adopted, are not frozen in place. The opposite is true: an agency may alter its rules in light of its accumulated experience in administering them (citation omitted).” *Id.* at 351.

Commenters are encouraged to address what form any new procedures might take, and what procedural safeguards must be preserved to assure that meaningful public participation and the Commission’s decisions are helpful to the Postal Service’s decision making process as required by law.

V. COMMENT PROCEDURES

Pursuant to 39 U.S.C. 505, Patricia Gallagher is designated as the Public Representative in this proceeding to represent the interests of the general public.

Interested persons are invited to provide written comments and suggestions as to how the Commission can best fulfill its statutory obligations. Comments are due within 60 days of the date of publication of this notice in the *Federal Register*. All comments and suggestions received will be available for review on the Commission’s website, <http://www.prc.gov>. Interested persons are further invited to review these submissions and provide follow-up comments and suggestions within 30 additional days of the due date for initial comments.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Docket No. RM2012-4 is established for the purpose of receiving comments in advance of developing regulations regarding new rules of procedure for evaluating requests for advisory opinions under 39 U.S.C. 3661.
2. Interested parties may submit comments no later than 60 days from the date of publication of this notice in the *Federal Register*.
3. Reply comments may be filed no later than 30 days from the due date for initial comments.
4. Pursuant to 39 U.S.C. 505, Patricia Gallagher is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
5. The Secretary shall arrange for publication of this Notice in the *Federal Register*.

By the Commission.

Shoshana M. Grove
Secretary